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CALIFORNIA SECOND DISTRICT COURT OF APPEAL

Civil No. 18,119

CLAYTON H. LYON, AQUILLA B. ZOOK, WILLIAM R. HILLARD, BALTCIR NEIBERGER, FRANK TOMSICK, FRANK H. MICETICH, R. F. ELLIS AND ERNEST R. VANICE, FOR AND IN BEHALF OF COMPTON, CALIFORNIA COMPANY OF JEHOVAH'S WITNESSES, AND WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,

Appellants,

v.

COMPTON UNION HIGH SCHOOL AND JUNIOR COLLEGE DISTRICT, S. P. BLOCK, MRS. M. COBURN, WILLIAM HOLLAND, ROBERT D. TRAEGER AND E. B. WYCKOFF,

Appellees.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judg-

ment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The courts below wrote no opinions whatever. The order of the District Court of Appeal is made a part of this statement, as Appendix A. The Supreme Court of California denied hearing without an opinion. The order is made a part of this statement, as Appendix B.

Questions Presented

I

Did the appellees and the courts of California construe the separation clause of the First Amendment to the United States Constitution contrary to the intent of the framers of the amendment because they precluded the state from allowing religious assemblies in public civic centers while permitting other types of assemblies?

II

Does the construction of the Civic Center Act so as to prohibit religious assemblies in the civic centers of California abridge appellants' freedoms of assembly, speech and worship contrary to the First and Fourteenth Amendments to the United States Constitution?

III

Does the construction of the Civic Center Act so as to prevent religious assemblies by the appellants while allowing similar and other meetings by all other groups in the public civic centers of California abridge the civil liberties of appellants contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Statutes Involved

This case draws into question the validity of state legislation known as the Civic Center Act of California, being Sections 19431-19439 of the Education Code of California, the primary section of which reads as follows:

> There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside.

The above statute was construed and applied to the admitted allegation of facts showing that the appellants are entitled to use the school auditorium as requested and that the appellees discriminated against the appellants in their exercise of the right of freedom of speech and freedom of assembly and freedom of worship, guaranteed against abridgment by the First and Fourteenth Amendments to the United States Constitution. The entire Civic Center Act appears as Appendix C to this statement.

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellants rely upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the District Court of Appeal, Second District, denying the original petition for writ of mandamus was entered on September 11, 1950. The judgment of the Supreme Court of California was rendered on the 9th day of November, 1950 and entered on the 9th day of November, 1950, whereupon the judgment denying the writ of mandate made by the District Court of Appeal became final. This appeal is duly presented and filed within ninety days from the date such judgment of the District Court of Appeal, Second District, became final. This appeal is therefore timely.

Nature of Case

This is an original action for a writ of mandamus brought by the appellants in the District Court of Appeal for the Second District at Los Angeles, California to compel the issuance of a permit to allow the appellants to use one of the school auditoriums opened up by the Civic Center Act of California.

How Constitutional Questions Raised

In the petition for writ of mandamus the appellants attacked the constitutionality of the act. In Paragraph XIX page 10 of the petition appellants claimed that the

denial of the application denied them rights guaranteed by the Constitution. In Paragraph XX page 11 appellants alleged that appellees "have allowed other organizations to use the said auditorium, . . . the same as the use proposed by the petitioners", and that the appellees' actions were in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. In Paragraph XXI of the petition the appellants alleged that the construction placed upon the Civic Center Act so as to deny to appellants the right to use the auditorium in question violated their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. The District Court of Appeal denied the petition for writ of mandate. See Appendix A. The Supreme Court of California refused the application for hearing. See Appendix B. These determinations constituted, together with the petition for writ of mandamus, the proper raising of the constitutional questions and an adequate showing to this Court that they were determined by the Courts of California pursuant to Rule 12 (1) of the Rules of this Court.

District Court of Appeal the Court of Last Resort

The District Court of Appeal, Second District, was the highest court in the State of California in which a decision could be had in this cause, although such court is not the highest court in the State of California. The order denying the writ of mandamus in an original action in that court was not susceptible of further review as of right in the state courts, and all proper steps were taken to secure further review by presenting an application for a hearing and for a writ of mandamus by the Supreme Court after denial without opinion by the District Court of Appeal of petition for mandamus to the Supreme Court of California. It refused to exercise its discretionary power and allow a

hearing and review of the decision by the Court of Appeal. See the order denying a hearing, Appendix B.

The District Court of Appeal, Second District, an appellate court having original jurisdiction in suits for mandamus rendered the judgment upon which the appeal herein is taken. Said judgment of said intermediate state court was rendered upon an original application for a writ of mandamus, which is proper according to California procedure.

The Supreme Court of the United States has held that where a judgment of a court is subject to discretionary review and such review is exhausted, the appeal may be taken directly to the Supreme Court of the United States, even though the judgment appealed from may be that of an intermediate court of the state. *Sullivan* v. *Texas*, 207 U. S. 416, 422; *American Railway Express Company* v. *Levee*, 263 U. S. 19, 20-21; *Callan* v. *Bransford*, 139 U. S. 197.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 1257 (2).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of the Case

The petition for writ of mandamus was filed with the District Court of Appeal, Second District, at Los Angeles. The petition showed that the appellants were qualified to apply for the use of the auditorium and that the appellees were under an obligation to issue a permit for the use of the

auditorium located in the Compton Union High School and Junior College building at Compton, California. (2) [1] Appellants alleged that their first application for the use of the auditorium was denied in 1949. See Paragraphs VIII-X. (4-6)

Later the application was renewed by appellants and the appellees called upon the county counsel of Los Angeles County for an opinion. See Paragraph XI. (6) The county counsel ruled that the act did not include religious use within the meaning of the term "moral interests" used in the act. (6) The application was denied. See Paragraph XII. (7)

Appellants alleged a third request for the use of the auditorium for "the mental improvement and moral interests of the community," during May, 1950. See Paragraph XIII. (7) The application was referred to the county counsel at Los Angeles who again ruled that it was unlawful to permit religious organizations to use the auditorium. See Paragraph XIV. (7-8) Appellees informed appellants that there was a policy against renting the auditorium for religious services and that they would "continue with that policy". See Paragraph XV. (8)

Appellants showed in their various applications that the nature of the meetings and the subject matter of the talks pertained to the moral and mental improvement of the community and that they are based upon the Bible. (8-9) Appellants offered to pay the expenses in connection with the use of the auditorium by them under the act. (10)

The construction and application of the act so as to refuse appellants the requested permit was attacked as being

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[1] Figures appearing in parentheses refer to the pages of the printed petition for writ of mandamus filed in the District Court of Appeal, which is a part of the record in this case.

in contravention to the Federal Constitution, in Paragraphs XIX, XX and XXI of the petition. (10-11)

The Questions Are Substantial

There has been discrimination against appellants in violation of the equal protection clause of the Fourteenth Amendment.

The action of the appellees in denying the permits and the order of the court below in refusing the writs of mandamus failed to give proper effect to and are not in harmony with applicable decisions of the Supreme Court of the United States as to equal justice under the law. The action here complained of violates the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution. *Skinner* v. *Oklahoma,* 316 U. S. 335; *Yick Wo* v. *Hopkins,* 118 U. S. 356.

It is well settled that discrimination is a violation of the Constitution. The permitting of other groups to use the auditorium in question for similar purposes while denying such use to Jehovah's witnesses, constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment. This discrimination by the administrative agency and the approval thereof by the court below are out of harmony with and are in conflict with *Skinner* v. *Oklahoma,* 316 U. S. 535 and *Yick Wo* v. *Hopkins,* 118 U. S. 356.

In *Niemotko* v. *Maryland,* 19 L. W. 4095, decided on January 15, 1951, this Court condemned discrimination by public officials against the exercise of civil rights by Jehovah's witnesses in these words: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." Mr. Justice Frankfurter, concurring in the judgment of the Court said:

"To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."

It is appellants' privilege to make use of the school auditoriums. It is appellees' unequivocal duty to make the school auditoriums available to all classes of religious groups. It must be remembered that the legislature of California did not intend to confer arbitrary, unfair or capricious power on the boards of education to discriminate against the appellants.

The separation clause of the First Amendment does not prohibit use of civic center auditoriums by religious groups and the denial to appellants on that ground constitutes an abridgment of rights of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments.

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exclude religious assembly from the protection written into the First Amendment, they would have written the exemption into the amendment. It is absolutely not permissible for a state or county or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception which does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds in a civic center, it likewise makes secure the right to hold religious meetings therein.

The doctrine of separation of church and state ought properly to be limited to the boundaries fixed by the framers

of the First Amendment. What the authors of the amendment had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the amendment did not intend to exclude religion from the benefits of freedom of speech and assembly provided for in the First Amendment. In fact, it has been declared that religion occupies a favored position in the law. It is a well-known fact that the states have explicitly provided that places of public worship shall be exempt from taxation. The Supreme Court of the United States has declared that this is a Christian nation. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 471.

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the court below requires this Court to discriminate against religious assemblies in favor of all other types of assemblies. This Court should not write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine advanced by the court below, which is an unlawful stretching of the principle of the separation of church and state. A fictitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed the Court would be discriminating against the religious organizations and misinterpreting the guaranty of freedom of assembly appearing in the First Amendment.

A far-reaching devastation is inherent in the state approval of the doctrine that separation of church and state forbids the incidental use of school property by a religious organization. If this principle is sound, then tax exemption to churches and religious organizations in every com-

munity of the nation by state constitutions is imperiled. If the First Amendment forbids to religious organizations the incidental use of school property for holding religious meetings (when the school is not being used for school purposes) by force of the same reason it also denies authority to the states in their constitutions and the Congress in the District of Columbia to grant tax exemption to religious organizations and churches.

The guarantee of freedom of religion in the First Amendment needs to be defined so that the doctrine of separation of church and state may have its boundaries fixed. That has not yet been done by this Court. The existing inconsistency is confusing. The ambiguity in the First Amendment, as it has been interpreted and construed in this case should be terminated through an immediate clarification by this Court.

The erroneous interpretation of the separation clause of the First Amendment by the appellees and the court below in these cases disrupt and disorganize completely throughout the United States the uniform practice of using school auditoriums for civic center purposes at times when not used by the schools. For over one hundred years it has been the general practice, with or without legislative authority, to permit school buildings, places of assembly, when not being used for educational purposes, to be used for the discussion of community, state and national problems.

Included among such users, especially in the rural districts, have been and are the religious organizations. In many communities there are no buildings where religious assemblies may be had unless the school is made available. Necessity, practice, usage, custom and statute throughout this country have made available the school auditoriums for religious gatherings when the schools are not using them. On the pretext that such use constitutes a violation

of the principle of separation of church and state the appellees and the court below have upset, flouted and denied this general custom and need which have been widely practiced and never constitutionally doubted. This denial has been on the theory that the use of the school auditorium by religious groups constitutes appropriation of public property for sectarian purposes contrary to the prohibition of such found in the state and federal constitutions.

The effect of the decision of the appellees and the court below is far-reaching. The constitutionality of the policy of forty-eight states' allowing school buildings to be used by religious organizations is imperiled. Thousands of communities and hundreds of thousands of people will be affected if the erroneous doctrine approved by boards is not reviewed by this Court and determined.

Should the principle by appellees and the court below be sanctioned by this Court, then an opening wedge has been driven to split asunder and upset completely the holdings of this Court that the streets and parks, which are publicly maintained by the state, can be used for public preaching.

The Court has held in many cases that the street preaching of Jehovah's witnesses by distribution of literature upon public property is protected by the freedom of religion provision of the First Amendment. The principle advocated by the appellees and approved by the court below, if extended, which it must be if accepted, would forbid the use of public streets and parks for the distribution of religious literature and preaching by ministers and missionaries, which this Court has held to be constitutional.

The approval of the principle that separation of church and state precludes the incidental use of public property by a religious organization to preach presents a national anomaly. It has produced a grotesque inconsistency that affects the rights and liberties of all of the people of the

nation. Should that principle be allowed to stand, the people of the nation will not know what is protected and what is prohibited by the First Amendment.

It is well settled that the use of school auditoriums (when not in use for school purposes) by religious organizations for religious services and assemblies for worship does not constitute a sectarian use in violation of the doctrine of separation of church and state. See *Nichols* v. *School Directors*, 93 Ill. 61 (1879); *School Directors* v. *Toll*, 149 Ill. App. 541 (1909); *Hurd* v. *Walters*, 48 Ind. 148 (1874); *Baggerly* v. *Lee*, 37 Ind. App. 139, 73 N. E. 921 (1905); *Townsend* v. *Hagan*, 35 Iowa 194 (1872); *Davis* v. *Boget*, 50 Iowa 11 (1878); *Gibbert* v. *Dilley*, 95 Neb. 527, 145 N. W. 999 (1914); *Greenbanks* v. *Bantwell*, 43 Vt. 207 (1870); *Lagow* v. *Hill*, 238 Ill. 428, 87 N. E. 369 (1909).

The position here taken by appellants is supported by a decision on May 29, 1948, by the Court of Appeals of the Republic of the Philippines in the case of *People of the Philippines* v. *Fernandez*, reported in 1948 Lawyers Journal 295. That case involved the use of a public building by Jehovah's witnesses. That use was sustained and held not to be a violation of the Constitution forbidding the use of public money or property for sectarian and religious purposes. A printed slip copy of the opinion is submitted with this statement. The marked parts thereof are referred to the Court for its consideration along with this statement.

The logic, reasoning and analogy of the above decisions which are squarely in point so far as the use of the school auditoriums of California by appellants is concerned, bring them squarely within the holding of *Everson* v. *Board of Education of Ewing Township*, 330 U. S. 1, as to the scope of the doctrine of separation of church and state that is to be found implicitly in the First Amendment.

Reliance has been placed by appellees upon *McCollum* v. *Board of Education*, 333 U. S. 203. This decision is not

authority against appellants. The principle of the *McCollum* case is limited to a constitutional prohibition of the use of school time and the course of instruction given children through the compulsory education law to teach religious doctrines, creeds and principles. *McCollum* v. *Board of Education.*

The issue in the *McCollum* case was confined to the precise problem of utilization of the compulsory education process and school system for religious training. It was not based upon the proposition that public property cannot be used for the exercise of constitutional rights by religious bodies, based upon the First Amendment. It is submitted that if the Court so held it would have so stated explicitly. If a public school building dedicated by law and regulation to community purposes by the directors of a board of education (making it like a public park) cannot be so used by a religious group, then by force of the same reason a public street or a public park could be kept back from use by a religious group. The doctrine of separation of church and state ordained by the First Amendment must not be distorted so as to itself become and abridgment of liberty. It would result in just that if the construction of the Constitution by the appellees is not corrected here.

The appellants bring themselves within the doctrine of *Everson* v. *Board of Education of Ewing Township,* 330 U. S. 203, and they are not precluded from relief that they were seeking by the holding of the Court in *McCollum* v. *Board of Education,* 333 U. S. 203.

The doctrine must not be stretched beyond the breaking point. Since the public streets and public parks cannot be withheld from religious organizations for exercise of their constitutional rights of free speech and free assembly (*Schneider* v. *New Jersey,* 308 U. S. 147; *Jamison* v. *Texas,* 318 U. S. 413; *Marsh* v. *Alabama,* 326 U. S. 501; *Niemotko*

v. *Maryland*, 19 L. W. 4095, January 15, 1951) then public schools that have been opened for community meeting purposes by the legislature of California may not be denied to appellants for such purposes.

The Supreme Court of Wisconsin has held that the state and Federal Constitutions do not exempt religious organizations from the guarantees of freedom of assembly and freedom of speech contained in the First Amendment. *County of Milwaukee v. Carter*, 45 N. W. 2d 90 (December 5, 1950). The argument made by the county counsel to the effect that the Constitution precludes the use of public places of assembly by religious organizations was specifically rejected by the Supreme Court of Wisconsin. The court said:

> When, in Art. I, sec. 3 the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict with and subordinate to the First and Fourteenth Amendments of the United States Constitution which neither make nor recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred right by others. The Milwaukee county ordinance purports not to regulate but to prohibit speech in public parks on political as well as religious subjects. Sec. 47.02 (7) provides: "No sermon, discussion, harangue or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which shall constitute a public criticism or abuse of any religious organization or representative thereof." Government may, in the interests of public order, safety and the equitable sharing of facilities, exercise reasonable control over

> when, where and under what conditions public meetings may be held on public property; but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions. Relying entirely on the facts which this record presents, it appears that Milwaukee county's ordinance is void, as in conflict with both constitutions, and the conviction under it is likewise void and must be set aside.

The interpretation of the Federal Constitution by the appellees and by the court below is in conflict with *Hannegan* v. *Esquire*, 327 U. S. 146, holding that a privilege, as distinguished from a right, may not be taken away from a person on arbitrary and capricious grounds.

The Civic Center Act grants the privilege to all organizations to use school buildings for places of assembly, when applied for by a responsible organization. The applications were made by a large congregation of persons acting through a committee.

Therefore the appellants respectfully submit that the applications were made in the form and in the manner required by law, which places upon the appellees the performance of a duty to issue the permit which was specifically enjoined by law.

This Court has held that dissentient beliefs and practices of, and the assault by, Jehovah's witnesses upon the orthodox religions were not grounds for denial of liberty guaranteed by the Bill of Rights. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115-116; *Cantwell* v. *Connecticut*, 310 U. S. 296, 310. The position here taken, that the decision of the court below and the rule of the appellees as representatives of the school board, are in conflict with the holding of the Court in *Hannegan* v. *Esquire*, 327 U. S. 146, is supported by the Court in *Danskin* v. *San Diego Unified School*

District, 28 Cal. 2d 536, 171 P. 2d 885. In that case the action was for mandamus to compel a school board to grant permission to use a school auditorium with condition that the applicants sign a loyalty oath. They contended that the oath statute was void on its face because it abridged the Constitutions of California and the United States.

The Supreme Court of California held that the action of the school board in refusing the permit because of the refusal to sign the loyalty oath was an abridgment of the right of freedom of speech and assembly, contrary to the First and Fourteenth Amendments. The court, among other things, said:

> The state is under no duty to make school buildings available for public meetings. (See 86 A.L.R. 1195, 47 Am. Jur. 344.) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (*Missouri* ex rel. *Gaines v. Canada*, 305 U. S. 337, 349; *Marsh* v. *Alabama*, 326 U. S. 501.) Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. (*Frost* v. *Railroad Commission of California*, 271 U. S. 583, 594; *Hague* v. *CIO*, 307 U. S. 496, 515; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111; . . .
>
> Since the state cannot compel "subversive elements" directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. . . .
>
> There is a parallel between the privilege in question and the privilege of using the mails at less than cost. In *Hannegan* v. *Esquire*, 327 U. S. 146, Mr. Justice Douglas speaking for the court declared: "But grave constitutional questions are immediately raised once

it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever." See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States* ex rel. *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437, 438.

The appellants have a constitutional right to use the school auditoriums because they have been opened by statute. The deprivation of the right is a denial of freedom of worship and assembly contrary to the equal protection clause of the Fourteenth Amendment. Where a right guaranteed by the Constitution has been violated, and there is no other remedy to redress the deprivation except by mandamus, the writ must issue.

The Constitution of California and the Constitution of the United States guarantee freedom of speech and peaceable assembly. (*Hague* v. *C.I.O.*, 307 U. S. 496; see also 21 Minn. L. Rev. 744.) The right of assembly cannot be effectively expressed without the use of public auditoriums and other meeting places. It was for the purpose of enabling the public schools to have a part in increasing such places of assembly that the legislature of California passed the law which authorized the members of the boards of education to permit school buildings to be used as places of assembly. Prior to the enactment of the sections of the Civic Center Act authorizing the use of school buildings for public meeting purposes there was no duty on the part of the school board or board of education to permit the use of school property for uses other than school purposes.

The Court is now called upon to halt the departure of the appellees and the court below from the usual and accepted practice and principles under the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The "supposed" discretion of appellees was exercised to an end or purpose not justified by the law and was clearly against the decisions of this Court which define the fundamental law of the land, and clearly establish an arbitrary and capricious abuse of discretion. This Court commanded the issuance of a writ of mandamus against the Board of Education in the case of *McCollum* v. *Board of Education*, 333 U. S. 203. In that case the Court reversed the holdings of the Illinois court and remanded the case for further proceedings consistent with the Court's opinion. 333 U. S. at page 212. See also *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885.

Conclusion

Wherefore the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the Court, because the District Court of Appeal, Second District, State of California, at Los Angeles, disposed of important and substantial federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

HAROLD SHIRE,
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APPENDIX "A"

ORDER OF THE DISTRICT COURT OF APPEAL SECOND DISTRICT

September 11, 1950.

By the COURT:

Petition for writ of mandate is denied.

WHITE,
Presiding Justice.
J. E. BROWN,
Clerk.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT

San Francisco, California,
November 9, 1950.

I have this day filed ORDER: HEARING DENIED in re: 2 Civ. No. 18119, Lyon, et al., vs. Compton Union High School et al.

Respectfully,

WILLIAM I. SULLIVAN,
Clerk.

APPENDIX "C"

CIVIC CENTER ACT OF CALIFORNIA

§ 19431. Civic centers created: Citizens, etc., authorized to engage in recreational activities and to meet for discussions: Authorization for use of other properties. There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recrea-

tional, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities. [Enacted 1943.]

§ 19432. Use of civic center or school property by subversive element.

Any use, by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered.

Any person who is affiliated with any organization, which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, or any organization of persons which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, is hereby declared to be and is characterized, a subversive element.

Notwithstanding any of the other terms of this chapter, no such governing board shall grant the use of any school property to any person or organization who or which is a subversive element as herein defined.

For the purpose of determination by such governing board whether or not such person or such organization of persons applying for the use of such school property, is a subversive element as herein defined, such governing board may require the making and delivery to such governing

board, by such person or any members of such organization, of affidavits in form prescribed by such governing board, stating facts showing whether or not such person or organization is a subversive element as herein defined.

Reference is hereby made to the provision of law relating to perjury, and the punishment therefor shall be applicable to persons making and delivering affidavits provided for under the provisions of this chapter. [Amended by Stats. 1945, ch. 1213, § 1.]

§ 19433. Use subject to rules and regulations: Interference with use for school purposes. The use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State. [Enacted 1943.]

§ 19434. Management of civic center. The management, direction, and control of the civic center is vested in the governing board of the school district. [Enacted 1943.]

§ 19435. Rules and Regulations. The governing board of the school district shall make all needful rules and regulations for conducting the civic meetings and for such recreational activities as are provided for in this chapter and which aid, assist, and lend encouragement to the activities. [Enacted 1943.]

§ 19436. Custodian of grounds: Appointment and power. The governing board of any school district may appoint a person who shall have charge of the grounds, preserve order, protect the school property, plan, promote, and supervise recreational activities, and do all things necessary in the capacity of a representative of the board. He shall have the power of a peace officer, to carry out the provisions and the intents and purposes of this chapter. [Enacted 1943.]

§ 19437. Use to be granted free. The use of schoolhouses, property, and grounds pursuant to this chapter shall be granted free. [Enacted 1943.]

§ 19438. Charge for use where admission fees are charged or contributions solicited.

In the case of entertainments or meetings where admission fees are charged or contributions are solicited and the net receipts of the admission fees or contributions are not expended for the welfare of the pupils of the district or for charitable purposes a charge shall be made for the use of the schoolhouses, property, and grounds.

The governing board may, however, permit such use, without charge, by organizations, clubs, or associations organized for general character building or welfare purposes, when membership dues or contributions solely for the support of the organization, club, or association, or the advancement of its character building or welfare work, are accepted. [Enacted 1943.]

§ 19439. Expenses for lighting, etc. Lighting, heating, janitor service, and the services of the person when needed, and other necessary expenses, in connection with the use of public school buildings and grounds pursuant to this chapter, shall be provided for out of the county or special school funds of the respective school districts in the same manner and by the same authority as similar services are provided for. [Enacted 1943.]

FILED
MAR 21 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 627

CLAYTON H. LYON, AQUILLA B. ZOOK, WILLIAM R. HILLARD, ET AL.,

Appellants,

vs.

COMPTON UNION HIGH SCHOOL AND JUNIOR COLLEGE DISTRICT, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HAROLD W. KENNEDY,
WM. E. LAMOREAUX,
Counsel for Appellees.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

2nd Civ. 18,119

CLAYTON H. LYON, AQUILLA B. ZOOK, WILLIAM R. HILLARD, BALTCIR NEIBERGER, FRANK TOMSICK, FRANK H. MICETICH, R. F. ELLIS AND ERNEST R. VANICE, FOR AND IN BEHALF OF COMPTON, CALIFORNIA COMPANY OF JEHOVAH'S WITNESSES, AND WATCHTOWER BIBLE AND TRACT SOCIETY, INC., *Respondents-Appellees*

vs.

COMPTON UNION HIGH SCHOOL AND JUNIOR COLLEGE DISTRICT, S. P. BLOCK, MRS. M. COBURN, WILLIAM HOLLAND, ROBERT D. TRAEGER AND E. B. WYCKOFF, *Respondent-Appellees*

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause for their statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellees' Motion to Dismiss or Affirm, respectfully show the following:

Statement of the Case

Appellants filed their petition for writ of mandate seeking to compel the appellees to permit the use of the auditorium of the Compton Union High School District for

religious meetings. The appellants' application to the appellees for such permit set forth that they were religious organizations, desired to use the auditorium for religious lectures and sermons, and that their application was made pursuant to the provisions of sections 19431, et seq. of the Education Code of the State of California, commonly known as the Civic Center Act. (Stats. 1943, Ch. 71, p. 690)

Section 19431 of the Education Code reads, as follows:

> "There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities."

Permission was refused by the appellees on the ground that the appellants and the purposes for which they desired use of the auditorium did not come within the provisions of said section. In the Court below the petition for the writ was resisted by the appellees upon this ground and upon the further ground that section 30, Article IV of the State Constitution prohibits such use. Section 30, Article IV of the Constitution reads, as follows:

> "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay

from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article."

The District Court of Appeal denied the petition for the writ.

Appellees state the following matters and grounds against the jurisdiction of this Court:

(1) Appellant Watchtower Bible and Tract Society, Inc. is a foreign corporation and as such had no standing to challenge the action of the lower court.

The use of public school buildings under the provision of the Civic Center Act is limited so far as here material to "associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts . . ." (Sec. 19431, Education Code)

According to the allegations of paragraph IV of the petition for writ of mandamus appellant is a New York corporation, chartered for the purposes of evangelistic preaching and the dissemination of bible information. It is obviously not an organization of the school district and, therefore, was not entitled in the first instance to apply for use of the school auditorium. It, therefore, has no standing to challenge the validity under the Federal Constitution of the State statute here involved. Mandamus will not lie where the petitioner fails to show that the writ will sub-

serve or protect some right or interest of the petitioner as a party beneficially interested.

Funeral Directors' Association v. *Board of Funeral Directors,* 67 Cal. App. (2) 311; 154 Pac. (2) 39.

(2) The decision below rests upon adequate non-federal grounds.

Non-federal grounds were asserted by appellants in the Court below as a basis for the writ of mandate prayed for. The lower Court, in its denial of the relief, did not write an opinion. Where non-federal questions are raised in the record but no opinion is delivered by the highest State Court in rendering judgment, it will be presumed that the decision is based upon a non-federal ground adequate to support it. In other words, appellants must affirmatively show that it was necessary for the State Court to pass on a Federal question in reaching its decision.

Woods v. *Nierstheimer,* 328 U. S. 211;
Adams v. *Russell,* 229 U. S. 353, 358;
Lynch v. *N. Y. ex rel Pierson,* 295 U. S. 53, 54-55.

The following non-federal questions were raised in the record:

(a) Were the appellants properly before the District Court of Appeal?

This question was raised by the allegations of paragraph XXIII (p. 12 and 13) of the petition, as follows:

> "The petition for writ of mandamus is filed with this Court instead of with a lower Court of the State of California for the following reasons: . . ."

Then follow four reasons by which appellants attempt to justify their failure to file the petition in a lower Court. Such an allegation is necessary when an application for a

prerogative writ is filed in the District Court of Appeal. Rule 56(a), Rules on Original Proceedings in Reviewing Courts; that rule reads as follows:

> "A petition to a reviewing court for a writ of mandate, certiorari, or prohibition, or for any other writ within its original jurisdiction, must be verified and shall set forth the matters required by law to support the petition, and also the following: (1) If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner render it proper that the writ should issue originally from the reviewing court; and (2) if any judge, court board, or other officer or tribunal in the discharge of duties of a public character be named therein as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding."

This rule has been held valid.

Brougher v. Board of Public Works, 107 Cal. 140; 290 Pac. 140.

Roma Macaroni Factory v. *Giambastiani,* 219 Cal. 435; 27 Pac. (2) 371.

Applications for prerogative writs should first be made to the Superior Court unless they are directed to that Court itself.

Roma Macaroni Factory v. *Giambastiani, supra.*

When application is made in the first instance to one of the higher courts, the first duty of that court is to decide whether or not sufficient justification for applying to that court has been shown. A decision adverse to the applicant upon this point is an adequate ground for denying the petition for the writ.

Redmond v. *Thieler,* 100 Cal. App. 188; 290 Pac. 919.

City of Oakland v. *Williams*, 99 Cal. App. 754; 290 Pac. 1044.

In the instant case it must be presumed that the decision of the District Court of Appeal in denying the writ and of the Supreme Court in refusing to grant a hearing therein was based upon this point.

(b) Did the application for permission to use the school auditorium come within the provision of section 19431, Education Code?

The appellants asserted in the lower court that they had an absolute right to use the auditorium under the provision of the Civic Center Act. They asserted in effect that they were one of the organizations named therein and the use was one of the uses authorized therein. Their allegations in this respect are as follows:

> "The petitioners have an absolute right to use said auditorium because their application was in compliance with the sections of the Civic Center Act regarding the use of school property for lawful purposes." (Par. XVII, p. 9, Petition for Writ of Mandate)

The purposes for which they desired to use the auditorium are set forth in paragraphs VIII and IX, pages 4 and 5 of the petition, and in paragraph VII, Appendix C thereof.

There was thus placed before the lower court the clear non-federal issue of whether or not these appellants and the purpose for which they requested use of the auditorium were included within the provision of section 19431 of the Education Code, which section precisely defines the type of organizations who have the right to use the school property and the purposes for which they may be used. The presumption is clear in the absence of any affirmative showing by appellants that the judgment of the lower court was based upon a non-federal ground, that is, upon

its conclusion that the appellants did not come within the terms of section 19431, Education Code. This constitutes an adequate non-federal ground to justify the Court's decision.

(c) Section 30, Article IV of the State Constitution prohibits the use of the school auditorium by the appellants under the Civic Center Act.

This non-federal question was posed to the lower court by reason of the allegations referring to the constitutional section contained in Paragraphs II, III, IV and VIII, pages 2, 3 and 4, and sub-paragraph 2, Paragraph XXIII, pages 12 and 13, of the Petition for Writ of Mandamus. The allegations therein contained in no uncertain terms assert that the appellants, California Company of Jehovah's Witnesses and Watchtower Bible and Tract Society, are religious organizations. That the individual appellants are evangelists and missionaries engaged in spreading the gospel of their faith and obtaining converts to their church. These allegations show that the spreading of their religious tenets was the sole purpose of the meetings for the direct benefit of the organizations concerned and, therefore, within the prohibitions insofar as the use of public school property is concerned of Section 30, Article IV of the State Constitution.

Among other sections of the Civic Center Act is Section 19437, Education Code, providing as follows:

> "The use of school houses, property, and grounds pursuant to this chapter shall be granted free."

Thus there was clearly put in issue before the lower Court the question of whether or not permitting appellants to use the school auditorium for the purposes requested would be granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose," in violation of the

express terms of the constitutional prohibition. This was a non-federal question clearly adequate to sustain the Court's judgment.

(3) The Federal question asserted by appellants is unsubstantial.

Appellants contended in the Court below that in the application of section 19431 by appellees there was discrimination against them, and inferred that other religious groups have been permitted use of the school auditorium for religious purposes, whereas, such use has been denied to them. There is no such showing in the record and if there were the answer would be, under the State statute and Constitution, that appellees should be restrained from permitting such other religious organizations from using the school auditorium.

Appellants assert that there is a denial of the right to free speech and of assembly by reason of the action of appellees. The cases relied upon do not support this contention.

Milwaukee County v. *Carter*, 45 N. W. (2) 90, cited by appellants, held unconstitutional an ordinance prohibiting speeches in public parks on political as well as religious subjects. However, in that case the Court clearly distinguished that situation from the use of public school property and funds to aid religion. In this connection, after quoting section 18 of Article I of the Wisconsin Constitution prohibiting State aid for religious purposes, the Court said, at page 92:

> "However, although under Art. I, sec. 18, Wis. Const., and the decision of this court in the Weiss case, supra, and other cases, and likewise the decision of the United States Supreme Court in the McCollum case, supra, such use of tax-supported public school property and public school funds is prohibited, no such restriction is considered applicable under the recent decisions of

the United States Supreme Court to the use of public parks or streets by the people in their constitutional right to peaceably assemble in the free and orderly exercise of their religion and the freedom of speech, and of the press, as provided in the First Amendment to the United States Constitution. . . ." (p. 92)

The case of *Everson* v. *Board of Education*, 330 U. S. 1-74, the school bus transportation case cited by appellants, is likewise not in point. Even though this Court there upheld a State statute permitting reimbursement from public funds for the cost of transporting pupils to and from parochial schools, it was pointed out that that was a borderline case and that, therefore, the intendment should be in favor of the constitutionality of the State statute. Neither the case of *Skinner* v. *Oklahoma*, 316 U. S. 535, the sterilization statute case, nor *Hannegan* v. *Esquire*, 327 U. S. 146, are applicable to the situation here involved, in view of the explicit provision contained in Section 30, Article IV of the State Constitution. No substantial Federal question has therefore been raised.

(4) The appellants in asserting unconstitutional discrimination and deprivation of constitutional rights have the burden of proving actual and injurious, not hypothetical discriminations, and the further burden of negativing every conceivable basis which might support the legislative classification.

Madden v. *Kentucky*, 309 U. S. 83, 88.
Pac. State Co. v. *White*, 296 U. S. 176, 185.

The inequality necessary to justify setting aside the classification must be actual not conjectural, hypothetical or sporadic.

Morf v. *Bingman*, 298 U. S. 407, 412, 413;
First National Bank v. *Tax Commission*, 289 U. S. 60, 64, 65.

There is no showing of discrimination in the case at bar. The purposes for which school auditoriums are made available by the Civic Center Act are purely public and community. The purposes for which appellants are organized and for which they desire use of the auditorium are purely private and sectarian.

On the foregoing matters and grounds making against the jurisdiction of this Court, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the District Court of Appeal of the State of California be affirmed.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel,

and

WM. E. LAMOREAUX,
Deputy County Counsel;

By HAROLD W. KENNEDY,
County Counsel,
Attorneys for Appellees.

(3689)

MAR 21 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1950

No. 628

SHIELD HALVAJIAN, et al., *Appellants*

v.

BOARD OF EDUCATION
OF THE CITY OF INGLEWOOD, et al.

No. 627

CLAYTON H. LYON, et al., *Appellants*

v.

COMPTON UNION HIGH SCHOOL
AND JUNIOR COLLEGE DISTRICT, et al.

APPEALS FROM SECOND DISTRICT COURT OF APPEAL,
STATE OF CALIFORNIA

JOINT BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEALS

HAYDEN C. COVINGTON
HAROLD SHIRE

Counsel for Appellants

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JOINT BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEALS

MAY IT PLEASE THE COURT:

Pursuant to Rule 7 (3) of the Rules of this Court the appellants in these cases file this their brief in opposition to the motion to dismiss.

The appellees contend that there is an adequate non-federal ground relied upon by the state court to sustain its judgment. We shall take each state ground which is claimed to have been relied upon by the court below and show that the motion to dismiss and to affirm is without merit.

I.

It is contended that appellants were not properly before the District Court of Appeal for the writ of mandamus because they should have applied first to the trial court and then appealed to the Court of Appeal, rather than bring an original action for mandamus, and that this is an adequate non-federal ground to support the order appealed from.

To begin with, this proposition was never raised by the appellees in the Court of Appeal or the Supreme Court of the state. The appellees answered the appellants on the merits, contending that the doctrine of separation of church and state of the constitutions precluded the appellants from using the school auditorium. It was not contended that the Court of Appeal did not have original jurisdiction.

Even if this procedural point had been raised in the District Court of Appeal there would have been no substance to it. It could not reasonably have been the grounds for the denial of the writ by the Court of Appeal. The District Court of Appeal had original jurisdiction to hear and determine the application for the writ of mandamus. See Rule 56 (a) of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California. Subdivision (1) of the rule provides that if "the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court".

The petitions complied with this rule. Three grounds were alleged, which, according to the state procedure,

authorized the original action in the Court of Appeal. See Paragraph XXIII, pages 12-13 of the printed petition in the *Lyon* case and Paragraph XVIII, pages 9-10 in the *Halvajian* case. Three decisions were cited where the District Court of Appeal and the Supreme Court of California had entertained original writs of mandamus against school boards in situations similar to this case. The citations are *Payroll Guarantee Association* v. *Board of Education*, 27 A. C. 213; *Ellis* v. *Board of Education*, 27 A. C. 337; *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885. The District Court of Appeal did not refuse the writ because the petition was not made to the trial court but considered the federal question and ruled upon it. See copy of the certificate herein as Appendix (pp. 12-13) which was signed by the Chief Justice of the Court of Appeal. See *Herb* v. *Pitcairn*, 324 U. S. 117, 125-128.

II.

It is contended that the appellants do not come within the terms of the Civic Center Act and that Section 30, Article IV of the California Constitution prohibits the use of school auditoriums by religious groups, including appellants, and that these are adequate non-federal grounds to support the order appealed from.

These two contentions are laced together. It is contended that the Civic Center Act does not permit religious organizations to use the auditoriums of schools. The appellees say that Section 30, Article IV of the state constitution prohibits religious organizations from using school auditoriums for religious meetings. The Civic Center Act does not in words expressly prohibit religious organizations from holding meetings in school auditoriums. The Act says nothing about the type of organization using the auditorium for assembly purposes. The Act has been interpreted and construed by the County Counsel of Los Angeles County not to include use of school auditoriums for religious assemblies.

This construction is said to be made necessary because of the separation clause of the First Amendment and Section 30, Article IV of the California Constitution which prohibits state aid or grants to religions except exemption of church property from taxes when used as a place of public worship "pursuant to Section 22 of this article".

The County Counsel for Los Angeles County has rendered to the Compton Union High School and Junior College District and to other schools of Los Angeles County opinions interpreting the Civic Center Act. The interpretation of the Act so as to exclude religious meetings has been based on a reading into the Act of a constitutional prohibition against the use of school property or other public property by religious organizations. This construction, itself, necessarily involves the separation clause of the First Amendment as shall now be demonstrated.

In his latest published opinion, dated May 10, 1948, interpreting the Act the County Counsel said that in "addition to the prohibition of our State Constitution the United States Constitution also prohibits any aid by the state supported public school system to a religious purpose. The first amendment to the United States Constitution, which provides for complete separation of church and state, was recently clarified by the United States Supreme Court in *McCollum* v. *Board of Education*, 92 L. Ed. Adv. Ops. Vol. 92, No. 11, page 451 . . . " See Volume 46 Opinions County Counsel 544 at 545.

The County Counsel invokes Section 30, Article IV of the California Constitution cited above. It reads:

"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious

creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article".

This provision has been firmly relied upon by the County Counsel to prohibit religious meetings in public buildings under the Civic Center Act. In 34 Op. C. C. at page 488 he said: "It is our opinion, however, that the constitutional section above quoted prohibits any school district from granting the use of school buildings to religious organizations, under the provisions of the Civic Center Act."

After referring to the various sections of the Civic Center Act the County Counsel said: "These sections, of course, must be read in connection with the Constitution and are controlled by the constitutional provisions above quoted." (34 Op. C. C. at page 44)

The County Counsel has not based the construction of the Act upon the words of the Act but upon an earlier opinion of the Attorney General of California that the Act would be enforced in an unconstitutional manner if religious organizations were permitted to hold meetings in school buildings. He said that the Attorney General advised the State Superintendent of Public Instruction that "if the Civic Center Act as it then existed was construed to authorize the use of school buildings for church purposes, the sections would be plainly unconstitutional. . . . and, it was the view of the Attorney General that the legislature could not empower governing boards of school districts to grant the use of the school buildings in violation of this constitutional provision. We concur in this opinion." (35 Op. C. C. 161, 162)

The enforcement of the Act by the schools in Los Angeles County so as to exclude religious organizations from the use of school auditoriums under the provisions of the Civic

Center Act flows from the advice of the County Counsel. He has said: "We have previously advised the school districts that sectarian uses are not proper under the Civic Center Act in view of the constitutional limitations on grants in aid of sectarian purposes." (37 Op. C. C. 1319) These and other opinions of the County Counsel were relied upon in his opinion expressed in a letter to the appellees in the *Lyon* case advising appellees to refuse the use of the school to the appellants. See the petition in the *Lyon* case, pages 20-23 and 32-34, where the separation clause of the First Amendment and the decision of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203, are relied upon as directing the refusal of the use of the school auditorium by appellants. See also page 19 of the petition in the *Halvajian* case.

The construction of the statute and the state constitution so as to preclude the religious meetings by appellants in the school is so interwoven with the federal question involved under the First and Fourteenth Amendments that they may not be considered adequate to support the judgment appealed from on non-federal grounds. The decision on the state constitutional provisions is not independent from the federal question presented. The failure of the non-federal question to be adequate and independent gives this Court jurisdiction to determine whether the First Amendment precludes church meetings in places of public assembly maintained by the public. "Where the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Company,* 243 U. S. 157.

This situation here presented is altogether different from the case where the state statute is held to be invalid under the state constitution. See *Lynch* v. *State of New York* ex rel. *Pierson,* 293 U. S. 52. The case here is similar to the cases where state statutes and ordinances have been

held valid under both the state and federal constitutions. It is not necessary to cite decisions where this Court has taken jurisdiction in such cases. They are legion. In the case at bar the state court has sustained the constitutionality of the Civic Center Act, as construed and enforced by the appellees, under the Federal Constitution. This construction of the First Amendment by the state court alone ought to be enough to warrant the noting of jurisdiction in these cases. The fact that the validity of the statute is said also to be supported by the state constitution does not take away the power of this Court to review and decide as was done in the cases from *Lovell* v. *Griffin*, 303 U. S. 44, to *Niemotko* v. *Maryland*, 71 S. Ct. 325, where laws were held by state courts to be valid under both the state and federal constitutions.

It is submitted that the order of the court below sustaining the construction of the statute and the state constitution by the County Counsel so as to exclude religious organizations from the places of public assembly is not based on a non-federal ground and, if it is, the basis is not independent or adequate to prevent this Court from deciding the questions here presented.

III.

There can be no independent and adequate non-federal ground under the state constitution supporting the judgment because the appellants have alleged a case of discrimination in violation of the equal protection clause of the Fourteenth Amendment.

Even if this Court were to rule that the holding that a religious organization cannot use public school property for religious assemblies is based on an adequate non-federal ground, that still does not warrant the granting of the motion to dismiss these appeals or affirming the order below. Regardless of whether the state or federal constitution forbids schools from authorizing sectarian use of assembly

places there has been a denial of a right contrary to the equal protection clause of the Fourteenth Amendment resulting from discrimination by the appellees.

In Paragraph XX, page 11 of the petition in the *Lyon* case and in Paragraph XV, page 8 of the petition in the *Halvajian* case it is alleged that the appellees have allowed other organizations to make the same use of the auditoriums proposed by the appellants while denying the right to them which constitutes discrimination in violation of the equal protection clause of the Fourteenth Amendment. Under California procedure in civil cases these allegations must be accepted as true and cannot be questioned, which is also the rule of this Court. The appellees have, notwithstanding this salubrious rule, challenged the allegations by saying that appellants have not discharged their burden of proof. We have argued the discrimination in the jurisdictional statement which need not be repeated here.

In the First Amendment there is no discrimination authorized against religious assemblies in favor of other types of assemblies. When all other types of assemblies are allowed and religious assemblies are prohibited by the appellants it is a discrimination in violation of the equal protection clause recently condemned by this Court in *Niemotko* v. *Maryland,* 71 S. Ct. 325, 328. See also the concurring opinion, 71 S. Ct. at top page 334. On this point the decision below conflicts directly with *Milwaukee County* v. *Carter,* 45 N. W. 2d 90, where an ordinance that forbade religious assemblies in the public park was held to be unconstitutional. The same argument made by the appellees here was rejected by the court in that case.

The appellants attempt to distinguish the *Carter* case from the facts in these cases on the ground that here is involved a school auditorium, while involved there was a public park. This is a distinction without a difference. The only difference between a public park and a public auditorium is that one does not have a roof over it, while the other

does have a roof which closes it from public use. When the roof has been raised, as here, from the auditorium of the school it becomes open to the public for use by all the public. This use is subject, of course, to the right of the school to regulate as to time. The Supreme Court of California has so held in another case under the Civic Center Act. In *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 P. 2d 885, the court said, among other things, that the "state is under no duty to make school buildings available for public meetings. (See 86 A. L. R. 1195, 47 Am. Jur. 344). If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (*Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337, 349; *Marsh* v. *Alabama,* 326 U. S. 501)." The appellants have done just that in these cases and defied successfully the *Danskin* decision through a misinterpretation of the separation clause of the First Amendment now being urged upon this Court.

The discrimination practiced here on the ground of the religious type of assembly can not be sustained any more than could be discrimination on the ground that it was an assembly of Negroes. There can be no discrimination allowed by the Constitution on account of race, color, or previous condition of servitude. There likewise can be no discrimination permitted on the ground of religion in this country. This Court's decision in *Shelley* v. *Kraemer,* 334 U. S. 1, controls here and the holdings of the courts below conflict with the decision in that case. This ground alone ought to be sufficient justification for the review by this Court contended for by Jehovah's witnesses here.

The motion to dismiss made in these cases is governed by the decision of this Court in *Williams* v. *Kaiser,* 323

U. S. 471. In that case it was held that where a writ was denied by a state court the Court will assume all facts to be true. In rejecting the same point made here the Court said:

"Thus in *Maguire* v. *Tyler*, 8 Wall. 650, and in *Neilson* v. *Lagow*, 12 How. 98, 110, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the ground that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on a federal right. And when we search for an independent state ground to support the denial we find none. (323 U. S. 471 at 478-479.)

CONCLUSION

It is submitted that there is no adequate non-federal ground which wholly supports the judgment of the court below and, therefore, the motion to dismiss ought to be overruled. In the alternative, it is submitted, if there is doubt as to this question because of ambiguity flowing from the failure of the court below to write an opinion, the order appealed from should be vacated and the cause remanded for further consideration and clarification of the federal questions involved. *Minnesota* v. *National Tea Co.*, 324 U. S. 117, 125-128.

It is further submitted that the motion to affirm ought to be denied and the Court should note probable jurisdiction

because there is a substantial federal question which has not been heretofore decided by this Court but which ought now to be determined by this Court.

Respectfully,

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APPENDIX

Civil No. 18,118

CALIFORNIA SECOND DISTRICT COURT OF APPEAL

SHIELD HALVAJIAN, THOMAS GOWAN, LEON BOONE, HAROLD BURT, CLAYTON HALVAJIAN, OSCAR NAVARETTE, LOREN DALTON and MORRIS HANSON, for and in behalf of INGLEWOOD, CALIFORNIA COMPANY OF JEHOVAH'S WITNESSES and WATCHTOWER BIBLE AND TRACT SOCIETY, INC.

Appellants

v.

BOARD OF EDUCATION OF THE CITY OF INGLEWOOD, CALIFORNIA, CHARLES L. BLEK, A. O. DUER, W. J. BEUCHEL, EVELYN M. ZILLGITT and ROBERT E. CRALLE

Appellees

On Appeal to the Supreme Court of the United States

CERTIFICATE

I, the undersigned Chief Justice of the District Court of Appeal of the State of California for the Second Appellate District, do hereby certify that the federal questions as to (1) whether the appellees denied appellants their rights to equal protection of the law in violation of the Fourteenth Amendment by allowing other organizations to use the auditorium in question while denying the use thereof to appellants and (2) whether the separation clause of the First Amendment, along with the State Constitution

of California, which prohibits state aid to churches, precluded appellants from using the auditorium, were each decided by this Court as a necessary ground for reaching the order denying the writ of mandate.

I further certify that the petition for writ of mandate was not denied by this Court because it had not been first presented to the Superior Court, inasmuch as circumstances were alleged in the petition justifying presentation to this Court.

Done at Los Angeles on this the 20th day of February, A. D. 1951.

WHITE
Chief Justice

[A similar certificate has been signed in the companion case.]